Supreme Judicial Court of Massachusetts.

COTTAGE STREET METHODIST EPISCOPAL CHURCH *v.* EDWARD KENDALL, EXECUTOR.

A gratuitous subscription, to promote the objects for which a corporation is established, cannot be enforced unless the promisee has, in reliance on the promise sued on, done something, or incurred or assumed some liability or obligation; and it is not sufficient that others were led to subscribe by the subscription sought to be enforced.

CONTRACT to recover the amount of a subscription by A. P. Rollins, the defendant's testator, towards the erection of a chapel for the plaintiff. The facts were substantially as follows:—

In April 1871, after the organization of the church, an informal meeting of persons interested in building a chapel for said church was held at the house of said Rollins, who was treasurer of the trustees. A subscription was thereupon opened to see how much could be raised for that purpose. Various persons announced their willingness to give different sums, and the secretary, at the time, in their presence and with their knowledge, wrote down their names, and the amounts so promised by each opposite thereto. Rollins was one of those so promising, and said that his name might be put down for $500. He afterwards, within a short time, acknowledged and ratified such subscription orally. Being treasurer of the trustees, he also received some payments from individuals on account of such subscriptions.

Some months after this meeting, and long before August 1872, some trouble arose between Rollins and the other members, and Rollins at their request withdrew from the office of treasurer, and subsequently voluntarily ceased all participation in the affairs of the society, except that he remained one of its trustees until the end of the year for which he was chosen, and was present at a reorganization of the church in August 1872, made necessary by some flaw in the original organization, in April 1871. No demand was made on him for payment. He died in March 1873.

The chapel was built before Rollins's death, by and for the use of the plaintiff. There was conflicting evidence as to whether anything was done, or any liability incurred or obligation assumed, by the plaintiff in reliance upon the subscription of Rollins.

The defendant contended that nothing was done, nor any liability or obligation incurred or assumed, by the plaintiff in reliance upon the subscription of Rollins, that there was no consideration for the

promise, and that the plaintiff was not the party to maintain this action; and asked the court so to rule.

But the judge before whom the case was tried without a jury, without passing upon the question of fact, whether the plaintiff, relying upon the subscription of Rollins, had done anything or incurred or assumed any liability or obligation, ruled that upon the facts above stated there was a sufficient consideration for the promise of Rollins, and that the plaintiff was the proper party to bring the action. The defendant excepted to these rulings.

J. W. Hammond, for the defendant.

D. F. Crane, for the plaintiff.

The opinion of the court was delivered by

GRAY, C. J.—The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by the law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor: *Exchange Bank* v. *Rice*, 107 Mass. 37. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made.

A promise to pay money to promote the objects for which a corporation is established falls within the general rule. In every case in which this court has maintained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown either by express vote or contract, assuming a liability or obligation, legal or equitable, or by some unequivocal act, such as advancing or expending money, or erecting a building, in accordance with the terms of the contract, and upon the faith of the defendant's promise, so that there was a consideration directly moving from the plaintiff to the defendant: *Fisher* v. *Ellis*, 3 Pick. 322; *Bryant* v. *Goodnow*, 5 Id. 228; *Amherst Academy* v. *Cowls*, 6 Id. 427; *Williams College* v. *Danforth*, 12 Id. 541; *Thompson* v. *Page*, 1 Met. 565; *Ives* v. *Sterling*, 6 Id. 310; *Walkins* v. *Eames*, 9 Cush. 537; *Myrick* v. *French*, 2 Gray 420; *Ladies' Collegiate Institute* v. *French*, 16 Id. 196; *Athol Music Hall Co.* v. *Cary*, 116 Mass. 471. So in *Hanson Trustees* v. *Stetson*, 5 Pick. 506, in which the subscriptions were to increase a ministerial fund,

the court "found it a fact agreed" (whether in the case stated, or by counsel at the argument, does not clearly appear by the report) "that in consequence of the accumulation of the fund by these means, the great purpose, namely, the settlement of a minister, has been effected."

The suggestion in 5 Pick. 508, substantially repeated in 6 Met. 316, and in 9 Cush. 539, that "it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant," was in each case but *obiter dictum*, and appears to us to be inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff they constitute no legal consideration for the defendant's promise to him.

The facts in the present case show no benefit to the promisor, and, although it appears that the chapel was afterwards built by the plaintiff, it is expressly stated in the bill of exceptions that the learned judge who presided at the trial did not pass upon the question of fact whether the plaintiff had, in reliance upon the promise sued on, done anything or incurred or assumed any liability or obligation. It does not therefore appear that there was any legal consideration for the promise upon which this action is brought.

Exceptions sustained.

The law on the subject of voluntary subscriptions for charitable, religious or educational purposes seems to present several distinct phases, which are well marked by the adjudications.

1. The first was that all such subscriptions were null and void for want of consideration, to wit, a pecuniary benefit to the promisor. And in the earlier decisions it seems to have been thought quite immaterial that the promisees had expended money or incurred liabilities, relying upon such subscriptions for reimbursement; or that the subscriber, after making his subscription, subsequently gave his note for the amount subscribed, or otherwise ratified the original transaction.

One of the earliest reported cases is *Boutell* v. *Cowdin*, 9 Mass. 254 (1812), where the defendant subscribed, with others, $100 for the creation of a permanent fund of $6000 for the support of the minister of the society of which he was a member, and subsequently gave his note to the plaintiffs, as deacons of the society, promising to pay them "$100 on demand, for the benefit of the church aforesaid." The note was defended for want of consideration, although the plaintiffs' counsel argued it was a benefit to the promisor, "inasmuch as the money was to avail to procure him the religious instruction so highly valued by him." The court considered the objection well founded, although there was another point involved, viz., whether the plaintiffs, if duly constituted deacons of the society, had by statute a corporate capacity to re-

ceive and manage a fund for *the support of the minister;* and the decision might perhaps be sustained on this ground. And perhaps, also, the peculiar want of consideration here was that there was no legal payee who could be compelled to carry out the trust and apply the money to the purpose in view. See 5 Pick. 508; 6 Pick. 434–5, where the case is so explained.

Two years afterwards, however, the same question was considered in *Trustees of Limerick Academy* v. *Davis*, 11 Mass. 112 (1814). The defendant and sixty others signed this paper: "Impressed with the sense of the advantages from free schools, we the subscribers agree to pay the several sums affixed to our names for creating an academy in Limerick, on such land as may be given by any subscriber and adjudged most convenient and central by a majority of the subscribers. July 1st 1808." The land was given and the academy erected on the site fixed upon by a majority of the subscribers. The legislature, in November 1808, incorporated the plaintiffs, and enacted that moneys subscribed for the use of said academy should be held by the plaintiffs and their successors in trust for said academy. In a suit by the plaintiffs upon such subscription-paper, a nonsuit was ordered by the full court, on the ground of "no mutuality, no parties, no valuable consideration." The decision itself may perhaps be supported upon the ground that the subscription-paper contained *no promisee*, either by name or description; but it is evident that the court thought the want of consideration "insuperable." "The grand principle is," said the court, "that voluntary agreements and promises, however reasonable the expectation from them of gifts or disbursements, even to public uses, where made without consideration, are not to be enforced as contracts. Here is nothing gained to the defendant, or lost to any one else."

In 1824 a similar question arose in the same court, in *Trustees of Bridgewater Academy* v. *Gilbert*, 2 Pick. 579. There the defendant with others, signed this paper: "We the subscribers being desirous that the academy edifice should be rebuilt immediately, do hereby promise to pay to the committee which may be chosen by the trustees of the Bridgewater Academy for the purpose of rebuilding the same, the several sums of money, materials or labor for the above purpose, which shall be set against our names. Nathaniel Gilbert twenty-five dollars in lumber." It appeared that the old academy was burned in 1822; that the trustees, a corporation, voted to rebuild when sufficient funds should be provided; that the defendant and others subscribed; that the trustees erected a new building, for which the defendant refused to furnish any lumber or pay any money, "because the new building was twenty-seven rods further from his house than the old one." The action was brought both upon the original subscription paper, and also for money paid, laid out and expended at his request. The plaintiffs were nonsuited, the court saying: "The subscription paper will not sustain the action, and the defendant, after he signed it, gave the plaintiffs no encouragement to proceed in rebuilding, the beginning to provide materials on the faith of the subscription paper alone, was not sufficient to show that expenses were incurred at his implied request." This may be considered one of the strongest reported cases against the validity of such subscriptions. The point that the promise was to the *committee* to be chosen by the trustees, while the action was brought by the trustees themselves, does not appear to have been raised by the defendant.

These views and decisions were much relied upon, and followed in *Foxcroft Academy* v. *Favor*, 4 Greenl. 332 (1826), in which there was a distinct payee

named in the subscription paper, and the case goes to the full extreme of the doctrine. The same may be said of *Steward* v. *Trustees of Hamilton College*, 2 Denio 403 (1845), affirmed on appeal in 1 Comstock 581 (1848), which was a subscription for a fund of $50,000, the interest of which was to be applied to the payment of the salaries of the officers of Hamilton College, N. Y. So long as such views generally prevailed, it was impossible to recover upon any such subscriptions; but as courts did not hesitate to pronounce such defences "base and dishonorable," as well as "unjust," they soon found a way to declare them invalid as well; and that estimation of the defence may account for the second phase or stage of the law on this subject.

2. This view was that when several persons subscribe a paper for some common public object, the promise of each is a consideration for the promise of the others, and the payee of the paper may enforce the promise against each and all. This doctrine seems to have been first made the express ground of judicial decision in New Hampshire: *Congregational Society in Troy* v. *Perry*, 6 N. H. 164 (1833). There the defendant signed this note: "Jan. 27th 1825. For and in consideration that a fund of $1000 be raised for the support of the ministry in the Congregational Society in Troy, I promise to pay said society, in part of the fund, $50 on demand." It appeared that on the day of the date of the note, a fund of $1000 was raised by notes of a similar import with this and made by different persons. The court said: "It is objected that the note is without consideration and void. But we are of opinion that a good consideration was shown in this case. When several agree to contribute to a common object, which they wish to accomplish, the promise of each is a good consideration for the promises of the others." This seemed plausible, and a legal way of overcoming the objection which had hitherto prevailed in such cases. It was accordingly incorporated without much reflection into some text-books, and was adopted and approved in many quarters, notably in *Watkins* v. *Eames*, 9 Cush. 537, and some others. But there is an inherent difficulty in such a proposition, and that is, that if the mutual promises *do form* a sufficient consideration for each other, so as to create a valid contract, it would be a contract *between the co-signers* only, and not between them and a third person, who was not a signer, and which he could enforce in *his own name*. It is not impossible that if the other signers carried out the object of the subscription, and advanced all the money required to accomplish it, they could recover of one delinquent subscriber, his proportionate part of the outlay; and perhaps this might be done, not only in a count for money paid, but also on the original subscription-paper. This last was the case of *George* v. *Harris*, 4 N. H. 533 (1829), in which there was no count for money paid, but only upon the original subscription, and in which the promise was to pay to "Arthur Livermore, in trust for the use of us respectively, unless applied for building the court house as above provided." And that case was cited and approved in *Lathrop* v. *Knoff*, 27 Wis. 214 (1870). It may be questioned whether a count for money paid was not necessary in this case, but at all events the decision is no authority for the doctrine it is often cited to support, that such mutual promises form a good consideration for a contract with a third person, not a subscriber, although named as payee, which he can enforce. A consideration of mutual promises wholly between A. and B. will not support a promise by either to pay C. The fallacy of such a proposition was clearly shown in the same state in which it had its birth, in *Curry* v. *Rogers*, 1 Foster 247 (1850).

There the defendant with others signed a subscription paper for the erection of a literary institution to be built by a committee afterwards chosen by a portion of the subscribers, the defendant not being present ; but none of whom were subscribers. They erected the building, and brought suit in their own names, both upon the subscription paper and also for money paid, materials furnished, &c., but were not allowed to recover on either count.

3. A third phase was, that although the payees named in said subscription paper could not recover upon *the original subscription paper* for want of a consideration, yet if relying thereon, they had properly expended money for the common object, they might recover upon a count for money paid, laid out, expended, especially if the defendant ratified the subscription after such outlay. The case of *Trustees of Farmington Academy* v. *Allen*, 14 Mass. 171 (1817), seems to be one of the earliest cases on this subject. This decision was directly followed in the subsequent case of *Bryant* v. *Goodnow*, 5 Pick. 228 (1827), notwithstanding the intermediate contrary decision in 2 Pick. 579, above cited, and is now the settled law of Massachusetts ; the doctrine being thus stated, viz. : When one subscribes with others a sum of money to carry on some common project lawful in itself, and supposed to be beneficial to the projectors, and money is advanced upon the faith of such subscription with the express or implied consent of the subscribers, an action for money paid, laid out and expended, may be maintained to recover the amount of the subscription, or such portion of it, as will be equal to the subscriber's proportion of the expense incurred. See also *Myrick* v. *French*, 2 Gray 423 (1854). In such cases the subscription paper is held to be a request and authority by the subscribers to lay out the money for the proposed object, and so the persons who advance it do so as agents and on behalf of the others, and thus the usual rule applies of a recovery for money laid out for the defendant's use, or at his request. And some cases hold that under such circumstances a recovery can be had even on the original subscription. One of the earliest supports of this view was *McAuley* v. *Billenger*, 20 Johns. 89 (1822), where several persons at a voluntary meeting of citizens were appointed a committee to receive subscriptions to repair a church. They received subscriptions promising to pay them certain sums for that purpose, made a contract for the repairs, which were carried out according to the terms of the subscription, and the subscribers were held bound to the committee upon the subscription paper alone, the court saying : "The consideration for the promise was the repairing of the church." See also *Watkins* v. *Eames*, 9 Cush. 537 (1852).

4. There is still another class of cases in which the validity of such subscriptions has been denied, but which may well be supported on different grounds ; and these are where by the terms of the subscription paper, each subscriber is to have an interest or share in the object of the subscription, a pew or pews in the church according to the amount of his subscription, a share in the academy, &c. Such were the cases of *Thompson* v. *Page*, 1 Met. 565 (1840) ; *Ives* v. *Sterling*, 6 Id. 310 (1843) ; *Myrick* v. *French*, 2 Gray 420 (1854), and many others ; but these all have distinct grounds of consideration, viz. : a benefit conferred or pecuniary interest acquired by the subscriber, and he is therefore bound by his contract in the same manner as any subscriber for shares in a *business* corporation, who makes an express promise to pay for his share, is liable therefor. They do not, therefore, necessarily conflict with the decision in the principal case, nor even with the doc-

trines advanced in the earlier cases upon purely gratuitous subscriptions.

5. There is also a fifth ground on which many such subscriptions rest; and that is where the payee, or the institution for whose benefit the subscription is made has expressly agreed to do certain things, perform certain duties, or has complied with the conditions on which the subscription was made; these promises, obligations, &c., of the promisee furnish a legal consideration for the promise of the subscriber, whether it was or was not any benefit to him. Thus, where D. subscribed $100 for Williams College, on condition it should not be removed from Williamstown to Northampton (as was then contemplated), and that the subscription should be accepted within a year, and a vote not to so remove the institution be entered on the records of the institution, all of which was done, it was held there was a sufficient legal consideration for the defendant's promise, and that the plaintiffs could recover: *Williams College* v. *Danforth*, 12 Pick. 541 (1832).

University of Vermont v. *Buell*, 2 Vt. 48 (1829), was one of the earliest to lay down this doctrine; where the defendant subscribed fifty dollars to pay for the erection of suitable college buildings, and it was held that the acceptance of the subscription and the actual commencement of the work consummated the contract, so that the defendant could not avoid payment; which rule was again directly affirmed in *State Treasurer* v. *Cross*, 9 Vt. 289 (1837). *Caul* v. *Gibson*, 3 Barr 416, rests upon the same grounds. Indeed, this is so plainly in analogy with the general principles of law as to have been universally received and acted upon in too many cases to cite in this note; but *Barnes* v. *Perine*, 2 Kern. 18 (1854), is worthy of note, being in the same state as *Hamilton College* v. *Stewart*, *ante*.

Possibly the case of *Trustees in Hanson* v. *Stetson*, 5 Pick. 506 (1827), may fall into this class, although not distinctly put on that ground by the court, and not easily reconcilable with what had been before decided by the same court. There several members of a church agreed in writing to subscribe whatever they felt able, to increase an existing fund for the support of a minister, the same not to be binding unless a sufficient amount was raised for that purpose. The defendant subscribed fifty dollars on that paper, and a sufficient sum having been subscribed subsequently, gave his note to the plaintiffs for the amount, acknowledging it to be "for value received." Upon the point of consideration the court said: "As to the consideration, it is admitted by the note, and cannot be contradicted without clear evidence to the contrary. The promise was made to a body authorized by the legislature to receive it. It was to increase a fund already in existence, which was to be applied to a most valuable purpose whenever it should be adequate. The very purpose of the subscription which the defendant was instrumental in obtaining was to put in activity the fund until then dormant. The promise was to be void unless enough were obtained. The case shows that enough was obtained. It is a sufficient consideration that others were led to subscribe by the very subscription of the defendant. And we find it a fact agreed, that in consequence of the accumulation of the fund by these means, the great purpose, viz., the settlement of a minister, has been effected." Possibly this last fact was the principal ground of the decision.

6. But there is still another class of cases on this subject, quite different from any of the foregoing, where there has been no expenditure incurred, or express promises made by the payee, but where, nevertheless, the subscriptions have been upheld upon the ground of

an implied duty and obligation on the part of the payee (if the subscription is accepted), to carry out the object of the paper, and apply the money for the purposes and objects intended by the donor. This is sometimes called an *implied promise* on his part; thus it has been said there exists a promise for a promise, a sufficient consideration upon familiar principles. This was most distinctly brought out as the ground of the decision in *Collier* v. *Baptist Education Society*, 8 B. Monroe 68 (1847). There the contract was in these words: "I hereby promise to pay to the trustees of the Baptist Education Society, or their order, $250, as a donation in five equal annual instalments." The society was a corporation, and authorized to receive donations for the benefit of the institution; and the court say: "The donation was authorized by law; there was on one side an obligation to appropriate this fund according to the provision of the charter, and the promise to pay on the other; and the note, viewed in connection with the law which authorized it, shows a sufficient consideration for its execution, and to estop the defendant to deny that there was no legal or valuable consideration." This it will be seen was a great step in advance of anything we have before considered, for there was no proof of any liability incurred, or promises made by the payee, nor of other similar promises made by other parties, induced by the defendant's donation. It lacked, therefore, every element which has been relied upon in the cases before referred to. A similar ground was distinctly maintained in *Troy Academy* v. *Nelson*, 24 Vt. 194 (1852). The same doctrine was also advanced by CHAPMAN, J., in *Ladies' Collegiate Institute* v. *French*, 16 Gray 201 (1860), but as in this last case the payees had expended large sums in carrying but the object of the subscriptions, and relying upon them for defraying the expenses, the actual decision has other grounds upon which to rest, than that of an implied duty or obligation to appropriate the funds for the purpose contemplated by the donor.

The case of *Amherst Academy* v. *Cowls*, 6 Pick. 427 (1828), seems to rest largely on this ground. There the defendant, in July 1819, gave his note to the plaintiffs for $100, "it being the amount of my subscription to the charitable fund for the education of indigent pious young men, and in pursuance of my covenants and engagements expressed in the constitution of said fund, by me subscribed May 23d 1818." The principal defence was a want of consideration. There was no proof of any expenditure incurred or liability expressly assumed by the payees, and there was no count for money paid. As to this point of the defence the court said: "Was there a consideration for this note when it was given? In one sense there was not; that is, the promisor had received nothing at the time from the payees which was of any pecuniary value. But it is quite sufficient to create a consideration that the other party, the payee, should have assumed an obligation in consequence of receiving the note, *which he was compellable either at law or equity to perform*; unless the promisor should be able to show when sued that the payee had refused, or was unable, or had unreasonably neglected to perform the engagement on his part; in which cases a defence might be raised on the ground of a failure of the consideration. The defence is not put upon that ground, and so it must be presumed that the corporate body to whom the promise is made has applied its funds to the purposes for which they were raised, or is ready and willing to do it whenever the different contributors to it shall have performed their engagements. *In a court of equity*

of general jurisdiction they could be compelled to discharge their duty. Without such a court they would be subjected to a loss of their charter by refusal or neglect; for without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects, which by common law would cause a forfeiture of their charter." "We do not find that it has ever been decided that where there are proper parties to the contract, and the promisee is capable in law of carrying into effect the purpose for which the promise is made, and is in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration."

Similar views were expressed in *Trustees of Fryeburg* v. *Ripley*, 6 Greenl. 443 (1830), in which it was held (notwithstanding the prior decision of *Foxcroft Academy* v. *Favor*, in the same court, and to which no allusion seems to have been made by court or counsel) that a subscription to a fund, the interest of which was to be appropriated for the support of a minister of the parish, was binding, although no expenses had been incurred or liabilities entered into by the plaintiffs; the bare acceptance of the subscription being held to be "an implied agreement to apply the proceeds of the fund as above mentioned. *This acceptance and undertaking of the trustees at the request of the donors form a good consideration for the note in question.*"

If the principles advanced in the last class of cases be entirely sound, it may be the principal case might have been supported on the facts found, notwithstanding the judge below did not pass upon the question of fact, whether the plaintiff had assumed any liability or obligation. There was a competent payee, an absolute subscription, an acceptance thereof by the payee, a subsequent ratification by the defendant, and an actual collection of money from the other subscribers, all of which might be thought to create an implied duty, or raise an implied promise to devote the proceeds to the object intended by the donors; and in that light, might, in the view of some authorities, constitute a good consideration for the defendant's promise. EDMUND H. BENNETT.

Supreme Court of Indiana.

THE WOOD MOWING AND REAPING MACHINE CO. *v.* CALDWELL.

A statute required agents of foreign corporations, before entering upon their duties, to file the evidence of their authority with the county clerk, together with the consent of the corporation, that suits brought by residents of the state on demands arising out of transactions with such agents, might be commenced against the corporation by service of process upon such agent. It then provided that whoever should act as such agent without complying with the statute, should be subject to a fine of $50; and that "such foreign corporation shall not enforce in any courts of this state any contracts made by their agents or persons assuming to act as their agents, before a compliance by such agents or persons acting as such, with the provisions" above recited.

Held, that a contract entered into by an agent before the filing of such authority and consent, was not invalid by reason of such omission.

Held further, that the corporation may recover on such a contract, provided such authority and consent are filed previous to the commencement of suit; but the failure to file the same will be valid ground for a plea in abatement.